

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
HAWAIIAN TELCOM, INC. )  
For Approval of Changes to its )  
Tariff. Transmittal No. 07-16. )  
\_\_\_\_\_ )

DOCKET NO. 2007-0233

PROTECTIVE ORDER NO. 23816

Filed Nov. 8, 2007  
At 12 o'clock P.M.

Karen Higashi.  
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Karen Higashi.

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Docket No. 2007-0233  
Protective Order No. **23816**

PROTECTIVE ORDER

The commission issues this Protective Order to govern this proceeding.<sup>1</sup>

I.

Background

Hawaiian Telcom is the incumbent provider of telecommunications services within the State of Hawaii ("State"). TWTC is a facilities-based, competitive provider of interstate and intrastate telecommunications services, including dedicated access (private line) and local exchange services. TWTC purchases unbundled network elements, including DS1 loop elements, from Hawaiian Telcom as part of its provisioning of competitive telecommunications services within the State.

TWTC currently provides telecommunications services to the State Judiciary ("Judiciary"). As asserted by TWTC:

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<sup>1</sup>The Parties are HAWAIIAN TELCOM, INC. ("Hawaiian Telcom" or "HT"), TIME WARNER TELECOM OF HAWAII, L.P. ("TWTC"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

(1) Hawaiian Telcom, and Pacific LightNet, Inc., all submitted bids for the Judiciary contract; and (2) at the bid opening, the rates submitted by each telecommunications carrier were revealed, and the rates submitted by Hawaiian Telcom, as reflected in Transmittal No. 07-16, were substantially below the rates submitted by Pacific LightNet, Inc. and TWTC.

On July 20, 2007, Hawaiian Telcom filed Transmittal No. 07-16, seeking to establish rates and charges for an Integrated Services Digital Network Services ("ISDN") customer arrangement for Customer ID #2007-500220. In addition, Hawaiian Telcom separately filed its cost data under confidential seal with the commission, with a copy served upon the Consumer Advocate, in support of Transmittal No. 07-16:

Enclosed as Attachments I and II are the cost support for the Company's proposed provisioning of a custom arrangement for Customer ID #2007-500220. The enclosure contains confidential aggregate and detailed cost and pricing factor information as well as formulas and methodologies used to derive the Company's underlying cost of service. If released publicly, competitors of Hawaiian Telcom, Inc., would be able to determine the Company's cost of service and strategically position their own products and services to their competitive advantage, thereby causing significant economic harm to the Company. Competitors could also use this information to develop cost estimates of their own services. Hawaiian Telcom, Inc. has expended considerable resources to develop its cost studies and its costing methodologies and models. Disclosure of this information would allow competitors to estimate service costs without expending their own resources as Hawaiian Telcom, Inc. was required to do. As a result, the Company is filing this information subject to Protective Order No. 2007-PO-02.

Hawaiian Telcom's Transmittal Letter No. 07-16, dated July 20, 2007, at 1.

On August 3, 2007, TWTC filed its Protest of Hawaiian Telcom's Transmittal No. 07-16, recommending that the commission suspend and investigate Hawaiian Telcom's transmittal. In its Protest, TWTC asserted that the rates set forth in Hawaiian Telcom's transmittal may be unjust and unreasonable, because the rates appear to be below the total service long run incremental cost of providing the service, and discriminatory.

On August 10, 2007, Hawaiian Telcom filed its Reply to TWTC's Protest. In its Reply, Hawaiian Telcom countered that: (1) its cost support, filed under confidential seal, demonstrated that its proposed rates and charges are not below its total service long run incremental cost and are non-discriminatory; and (2) TWTC's claims were unpersuasive and without supporting basis.

On August 16, 2007, the commission suspended Transmittal No. 07-16 and opened this investigation to examine the merits of Hawaiian Telcom's transmittal.<sup>2</sup> On August 29, 2007, the Consumer Advocate issued information requests to Hawaiian Telcom. On August 31, 2007, TWTC filed its Motion to Intervene. On September 10, 2007, Hawaiian Telcom filed its Memorandum in Opposition to TWTC's Motion to Intervene. On September 12, 2007, Hawaiian Telcom filed its partial responses to the Consumer Advocate's information requests, explaining that certain of its responses "contain confidential information which will be filed upon the issuance of a protective order in this proceeding."<sup>3</sup>

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<sup>2</sup>Order No. 23606, filed on August 16, 2007, at 7.

<sup>3</sup>Hawaiian Telcom's Letter, dated September 12, 2007, at 1.

On September 17, 2007, Hawaiian Telcom and the Consumer Advocate jointly submitted their stipulated protective order for the commission's review and consideration. Due to TWTC's status as a movant at the time, TWTC did not review or sign the stipulated protective order.

On October 3, 2007, the commission issued Order No. 23693, granting intervention to TWTC, and directing Hawaiian Telcom, the Consumer Advocate, and TWTC to submit by October 24, 2007, a stipulated protective order that included TWTC as a signatory and the reference to any consultants retained by the commission as a "Qualified Person" who is entitled to review any information filed under confidential seal.<sup>4</sup>

Hawaiian Telcom and TWTC could not reach agreement on a stipulated protective order. Thus, on October 24, 2007, Hawaiian Telcom and TWTC separately submitted their proposed protective orders for the commission's review and consideration.<sup>5</sup> As acknowledged by Hawaiian Telcom and TWTC, the carriers

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<sup>4</sup>Order No. 23693, filed on October 3, 2007. The commission, at page 14 of Order No. 23693, noted:

At this time, no action will be taken by the commission on the Stipulated Protective Order jointly submitted by Hawaiian Telcom and the Consumer Advocate on September 17, 2007. Rather, the Parties shall reach a good-faith agreement on a Stipulated Protective Order, while remaining cognizant of Hawaiian Telcom's concerns that TWTC may seek to gain a future unfair competitive advantage if Hawaiian Telcom's confidential cost support for Transmittal No. 07-16 is disclosed to TWTC.

Order No. 23693, at 14 n.25.

<sup>5</sup>Hawaiian Telcom's Transmittal Letter, dated October 24, 2007; Proposed Protective Order; Office of Information Practices' ("OIP") Op. Ltr. No. 07-05; and OIP Op. Ltr. No. 97-4. TWTC's Transmittal Letter, dated October 24, 2007; and Exhibit A, Proposed Protective Order.

disagree over certain language Hawaiian Telcom seeks to include in Paragraph 4 of the protective order, which TWTC opposes. Specifically, TWTC opposes the inclusion of the language underlined below, as follows:

CLASSIFICATION

4. A Party may designate as confidential any information it believes, in good faith, contains trade secrets or other confidential research, development, commercial, financial, vendor, or bid information, including but not limited to cost support studies, detailed financial information and service forecasts. Such information shall be protected against disclosure to a non-qualified person pursuant to the terms of this protective order, unless such information is declassified, or permission to disclose the information to such non-qualified person is granted by the party claiming confidentiality, as provided in paragraph 13 below. In addition, a Party may designate certain information as being confidential and not to be distributed to another Party (not including the Consumer Advocate) by notifying the Commission and the Consumer Advocate in writing setting forth in particularity the information to be kept as confidential and not available to the other Party. With respect to such confidential information, the Party to whom such information is being withheld shall be treated as a non-qualified person from whom such information shall be protected against disclosure in accordance with the terms of this protective order. The Party submitting such other Confidential Information that is not to be distributed to other Parties shall place upon the applicable material the following legend:

**CONFIDENTIAL**  
**SUBJECT TO PROTECTIVE ORDER**  
**TO BE VIEWED ONLY BY**  
**THE PUBLIC UTILITIES COMMISSION**  
**OR THE CONSUMER ADVOCATE**

The deadline for the Parties to submit their stipulated procedural order was October 31, 2007. By joint letter dated October 31, 2007, the Parties request an extension of time until ten days following the issuance of this Protective Order to file their stipulated procedural order.

A.

Hawaiian Telcom's Position

In seeking to include the disputed language in the protective order issued by the commission, Hawaiian Telcom contends:

1. The disputed language is standard language that is included in many protective orders to which competitors of telecommunications services are parties. Hawaiian Telcom cites to In re Public Util. Comm'n, Docket No. 2006-0400, as a specific example.<sup>6</sup>

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<sup>6</sup>Docket No. 2006-0400 involves the commission's pending investigation of Hawaiian Telcom's service quality and performance levels and standards in relation to its retail and wholesale customers. The parties in Docket No. 2006-0400 are Hawaiian Telcom, the United States Department of Defense, the Consumer Advocate, and two competitive telecommunications carriers, Pacific LightNet, Inc., and TWTC.

On December 11, 2006, in Docket No. 2006-0400, the commission approved and issued the proposed stipulated protective order signed and agreed-upon by the parties. Paragraph 4 of Stipulated Protective Order No. 23127, filed on December 11, 2006, states in relevant part:

2. Hawaiian Telcom's costing and pricing information is highly confidential and is the most sensitive of all competitive information, and it must be able to file this information with the commission with the knowledge that doing so will not jeopardize its confidentiality. According to Hawaiian Telcom:

Disclosure of this information would substantially reveal Hawaiian Telcom's cost of service, pricing strategy and profit margin and would place Hawaiian Telcom at a disadvantage in any future bids. In particular, disclosure of costing information would place Hawaiian Telcom at a competitive disadvantage. The information easily could be used to determine the cost of Hawaiian Telcom's provision of the service and, by knowing Hawaiian Telcom's underlying costs, a competitor could approximate what Hawaiian Telcom's bid would be in future [requests for proposal] and price its proposal accordingly. The information would also permit a party to derive Hawaiian Telcom's margins.

The significance of this information is highlighted by the Judiciary's issuance of a second IFB (Invitation for Bid No. J08190, issued October 15, 2007). This IFB involves loop costs for similar locations as the IFB under review here. Allowing TWTC to see Hawaiian Telcom's cost and costing analysis for the loops that will be the same for the second IFB essentially will

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. . . . In addition, a Party may designate certain information as being confidential and not to be distributed to another Party (not including the Consumer Advocate) by providing all Parties with the information set forth in paragraph 5 below and notifying all Parties with the information set forth in paragraph 5 below and notifying the Commission and Consumer Advocate in writing setting forth in particularity the information to be kept as confidential and not available to the other Party(ies). With respect to such confidential information, the Party to whom such information is being withheld shall be treated as a non-qualified person from whom such information shall be protected against disclosure in accordance with the terms of this protective order.

Docket No. 2006-0400, Stipulated Protective Order No. 23127, ¶ 4, at 4.



permit TWTC to know Hawaiian Telcom's costs for its bid under the second IFB. Since Hawaiian Telcom is the current provider of the services under review in the second IFB, Hawaiian Telcom stands to lose significant revenues . . . if it is unsuccessful. Bid responses are due November 30, 2007.

Hawaiian Telcom's Transmittal Letter, at 5 (emphasis added).

3. Aside from the competitive harm that will result, requiring TWTC to view Hawaiian Telcom's highly sensitive information creates the potential for TWTC to unduly delay the proceeding and unreasonably broaden the issues.

4. Hawaiian Telcom's proposed protective order contains safeguards to ensure that only legitimate, highly confidential information is filed pursuant to the disputed language provision, and that the rights to challenge such a designation are preserved.<sup>7</sup> "These safeguards balance the needs of the disclosing party to maintain the confidentiality of its highly sensitive information from its competitors by requiring the disclosing party to explain the reason for its designation of the information as highly confidential and preserving the right of any other party to challenge the designation. In this manner, the protective order is consistent with the rationale in OIP Op. Ltr. No. 07-05. The protective order also enables the Commission (and Consumer Advocate) to view the highly confidential information and, ultimately, to decide any challenge."<sup>8</sup>

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<sup>7</sup>Hawaiian Telcom cites to Paragraphs 5 and 24 of its proposed protective order.

<sup>8</sup>Hawaiian Telcom's Transmittal Letter, at 3-4.

5. The general rule under HRS chapter 92F of the Uniform Information Practices Act ("UIPA") mandates the disclosure of governmental records. Nonetheless, the information that Hawaiian Telcom needs to keep confidential from its competitors falls within two recognized exceptions to the disclosure of government records under the UIPA. Specifically:

A. Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function (HRS § 92F-13(3)).

B. Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure (HRS § 92F-13(4)).

6. Disclosing the highly confidential information to a competitor will frustrate a legitimate government function, contrary to HRS § 92F-13(3). HAR § 6-80-42(a) requires the incumbent telecommunications carrier to complete and submit a cost study for all tariffs of noncompetitive services, unless ordered otherwise by the commission. Thus, to receive the commission's pricing approval for a particular service, Hawaiian Telcom regularly submits detailed cost data for the service, together with forecasted usage and other information. Hawaiian Telcom will be unable to prove, and the commission will be unable to determine, whether the proposed rate for a particular service is just and reasonable, without the highly confidential cost support. "Yet that is precisely the result that disclosure of confidential information likely would achieve because utilities would be adverse to providing such information, knowing that it

would be openly available to a competitor - indeed, to anyone - to examine and use to its benefit and to Hawaiian Telcom's detriment."<sup>9</sup>

7. "Disclosure of the highly confidential information [will] provide TWTC with an unfair advantage in any future bids and likely will impair the Commission's ability to receive necessary information as it [will] have a chilling effect on the provision of such information by the utilities. For these reasons, HRS § 92F-13(3) requires that the information not be disclosed."<sup>10</sup>

8. The commission may restrict the viewing of highly confidential information pursuant to HRS § 92F-13(4). In OIP's Opinion Letter No. 90-2, dated January 18, 1990, the OIP held that a government agency may enter into a confidentiality agreement that protects certain information from disclosure. Although the commission is not a "state or federal court," the logic that supports the exemption for court-protected records applies with equal force to confidential information the

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<sup>9</sup>Hawaiian Telcom's Transmittal Letter, at 6.

<sup>10</sup>Hawaiian Telcom's Transmittal Letter, at 7-8.

Hawaiian Telcom cites to OIP's Opinion Letter No. 97-4, dated April 22, 1997, as support. In that opinion, the OIP held that the costs set forth in the subcontracts between the general contractor selected by the State to build the Hawaii Convention Center, and its subcontractors, constituted confidential commercial and business information that were protected from disclosure under the "frustration of a legitimate governmental function" exception. The OIP reasoned that the disclosure of these amounts would substantially reveal the general contractor's profit margin between its subcontracting costs and the bid amount payable by the State and would likely put the general contractor at a disadvantage to its future competitors and cause substantial competitive harm to the general contractor.

commission has protected. Therefore, since the records are protected from disclosure by the commission, the records are exempt from disclosure.

9. In the event the commission declines to incorporate the disputed language into the protective order, Hawaiian Telcom believes that the qualifications for a "Qualified Person" of TWTC must be strictly interpreted.

B.

TWTC's Position

In objecting to the language at issue, TWTC contends that it should be provided with all information designated as confidential and submitted by Hawaiian Telcom in this proceeding. In support thereto, TWTC states:

1. If TWTC does not have access to the cost and other information Hawaiian Telcom submits in this proceeding, TWTC will be unable to assist the commission in developing the record.

2. The issues in this proceeding, as identified by the commission in Order No. 23693, are whether the rates Hawaiian Telcom proposes to charge Customer ID #2007-500220 are cost-based and nondiscriminatory, pursuant to HAR §§ 6-80-33 (pricing - noncompetitive services) and 6-80-37 (nondiscrimination in the provision of telecommunications services). As a provider of telecommunications services, and as the current provider of services to the customer at issue herein, TWTC has the expertise that can assist and advise the commission in a number of ways.<sup>11</sup>

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<sup>11</sup>See TWTC's Transmittal Letter, at 2.

However, in order to provide this assistance, TWTC must be permitted to review Hawaiian Telcom's cost support and information on its other primary rate interface contracts.

3. There is no justification for Hawaiian Telcom to withhold relevant information from TWTC, since the proposed protective order already contains sufficient protections against the use of confidential information for purposes that might be harmful to Hawaiian Telcom. First, Section 15 of the proposed protective order prohibits the use of confidential information for any purpose other than in connection with this proceeding. Second, the disclosure of confidential information under Section 12 of the proposed protective order is limited to "Qualified Persons," and specifically excludes any person "who is engaged in developing, planning, marketing, or selling the party's or participant's products or services, or determining the costs of the party's or participant's products or services or designing prices of the party's or participant's products or services to be charged to customers."

4. "TWTC intends for the following persons to be '[Q]ualified [P]ersons': Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel. TWTC may also retain an independent consultant. None of these persons engage in any of the activities that would disqualify them from being a '[Q]ualified [P]erson.'"<sup>12</sup>

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<sup>12</sup>TWTC's Transmittal Letter, at 3.

5. The purpose of the protective order is to address confidential information, and to provide adequate protections for Hawaiian Telcom. Hawaiian Telcom should not be permitted to withhold information from TWTC that is necessary for TWTC to participate in this proceeding.

6. In the alternative:

If the Commission determines that the language proposed by HT should be included in the Stipulated Protective Order, TWTC believes that this language must be limited. For example, HT should not be permitted to unilaterally determine what information is provided to TWT[C], there should be some standard for determining what information can be withheld from TWTC, TWTC should be provided a sufficient description of the information that has been withheld to allow it to object to the designation, and HT should have the burden of demonstrating that the protections contained in the Stipulated Protective Order are not sufficient to protect HT from unauthorized use of disclosure of the information.

TWTC's Transmittal Letter, at 3 n.1.

## II.

### Discussion

HAR § 6-61-50 states:

Protective orders. A party or any person may move for a protective order to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by law. A motion for a protective order shall specifically identify the document or information to be protected. The movant shall bear the burden of establishing that the information should be protected. Stipulations for a protective order, subject to the commission's approval, may be accepted in lieu of motions for protective orders.

HAR § 6-61-50.

HAR chapter 6-80 sets forth standards and procedures governing the intrastate telecommunications market. HAR § 6-80-9 states:

Confidentiality of proprietary information and materials. (a) The confidentiality of a telecommunications carrier's proprietary information and materials is recognized and preserved, to the extent provided by law. No telecommunications carrier is required to release or share with any person any of the carrier's confidential proprietary information or materials, except as provided in subsection (c).

(b) Every telecommunications carrier shall respect and protect the confidentiality of proprietary information and materials of, and relating to, other telecommunications carriers (including resellers of telecommunications services), equipment manufacturers, and customers. A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications services shall use such information only for such purpose and not for its own marketing efforts.

(c) Where any confidential proprietary information is relevant to a proceeding before the commission, the commission may require the submission of such information in the proceeding under confidential seal and subject to appropriate restrictions against the use of such information for marketing or strategic purposes.

HAR § 6-80-9 (emphasis added).

Hawaiian Telcom seeks the inclusion of the disputed language in the protective order, in order to protect against the disclosure of its cost and pricing information to its competitor, TWTC. Hawaiian Telcom expresses its fear that TWTC, if it is allowed to review this information, may use the incumbent carrier's costing and pricing methodologies to Hawaiian Telcom's competitive disadvantage in the future. In this regard, Hawaiian Telcom specifically refers to a second IFB recently issued by the

Judiciary on October 15, 2007, with bids due by November 30, 2007.

TWTC counters that in order to meaningfully participate and assist the commission in this proceeding, it must have access to Hawaiian Telcom's cost support and information on its other primary rate interface contracts. TWTC also asserts that the protective order already contains sufficient safeguards to protect against the use of confidential information to Hawaiian Telcom's detriment.

Both parties also propose mitigation measures for the commission's consideration.

Here, the commission acknowledges Hawaiian Telcom's concern that disclosing its cost and pricing information to TWTC, a direct competitor, may place the incumbent carrier at a competitive disadvantage in the future where both carriers seek to offer and provide telecommunications services to a specific customer or customers under a competitive bid process. Nonetheless, the commission concurs with TWTC's assessment that it will be unable to meaningfully participate and assist the commission in developing a sound record without having access to HT's cost and pricing information related to the ISDN custom arrangement for Customer ID #2007-500220. In this regard, the commission, in granting intervention to TWTC, noted that "TWTC's status as a competitive facilities-based provider of intrastate telecommunications services, together with its industry expertise and firsthand experience in providing the service at issue to Customer ID #2007-500220, should assist the



commission in developing a sound record on the relevant issues stated herein, without unreasonably broadening said issues or unduly delaying this proceeding."

In striking the appropriate balance, the commission finds that the language of the Protective Order issued today provides sufficient safeguards to protect against TWTC's use of Hawaiian Telcom's confidential information to the incumbent carrier's detriment. For example, though by no means an exhaustive list: (1) pursuant to Paragraph 15, below, with respect to Hawaiian Telcom and TWTC, any confidential information disclosed between them is limited solely to this proceeding, "and shall not be used for any other purpose, including business, governmental or commercial purposes, or in any other administrative or judicial proceeding[;]" and (2) "Qualified Persons" who receive confidential information that is disclosed in this proceeding must affirmatively sign and abide by a non-disclosure protective agreement (Paragraph 14, below, and Exhibit A, attached hereto), and shall be subject to sanctions by the commission for violating the Protective Order (Paragraph 32, below).

Moreover, the commission will also adopt Hawaiian Telcom's alternative position and strictly limit the scope of qualified TWTC personnel who are authorized by this Protective Order to have access to the confidential information disclosed by Hawaiian Telcom in this proceeding. Specifically, the commission, with respect to TWTC, will limit the term "Qualified Persons" to the following individuals identified by TWTC:

Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel.

As an additional safeguard, the commission will limit the disclosure of confidential information sought by TWTC to the cost and pricing information directly related to the ISDN custom arrangement for Customer ID #2007-500220. Thus, at this juncture, the commission denies TWTC access to Hawaiian Telcom's confidential information on its other primary rate interface contracts.<sup>13</sup>

In reaching this decision, the commission notes that the Protective Order issued by the commission today applies to the disclosure of confidential information between the Parties in this proceeding, consistent with HAR § 6-80-9(c). Moreover, the disclosure of the incumbent telecommunications carrier's confidential cost information to its competitors' party representatives as part of a commission investigative proceeding appears consistent with In re Public Util. Comm'n, Docket No. 7702, the commission's generic docket which facilitated the introduction of competition in the State's telecommunications market.<sup>14</sup>

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<sup>13</sup>The commission, if necessary, will revisit this issue at a later date, in the event a motion for compel is filed by TWTC pursuant to Paragraph 24 of this Protective Order.

<sup>14</sup>See Docket No. 7702, Stipulated Protective Order No. 14820, filed on July 31, 1996; and Protective Order No. 15492, filed on April 8, 1997.

### III.

#### Protective Order

The provisions set forth below are substantially similar to the provisions set forth in the proposed protective orders submitted by Hawaiian Telcom and TWTC to the commission on October 24, 2007,<sup>15</sup> except that: (1) the disputed language is excluded in Paragraph 4, below; and (2) for Paragraph 12.d, with respect to TWTC's personnel, persons having access to the confidential information disclosed in this proceeding, is limited to certain identified personnel and to TWTC's counsel.

1. This protective order governs the classification, acquisition, and use of trade secrets and other confidential information produced by any Party in this docket.

2. All Parties or Participants to all or any portion of this docket, including persons who are granted intervention or participation after the effective date of this protective order, shall be subject to this protective order. If the commission designates a person as a Qualified Person pursuant to paragraph 12.e. below, that person shall comply with the provisions of this protective order, including executing a Protective Agreement.

#### Application of the Uniform Information Practices Act

3. To the extent that any of the documents covered by this protective order consist of "government records," as defined in HRS § 92F-3, the provisions of HRS Chapter 92F (UIPA) shall apply to the disclosure of information contained in such

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<sup>15</sup>For purposes of consistency, the commission has retained the references to Participants in the Protective Order, even though the deadline to file a motion for participation has expired, and there are no Participants in this proceeding.

documents. In the event any provision of this protective order conflicts with any provision of the UIPA, the UIPA shall control.

#### Classification

4. A Party may designate as confidential any information it believes, in good faith, contains trade secrets or other confidential research, development, commercial, financial, vendor, or bid information, including but not limited to cost support studies, detailed financial information and service forecasts. Such information shall be protected against disclosure to a non-Qualified Person pursuant to the terms of this protective order, unless such information is declassified, or permission to disclose the information to such non-Qualified Person is granted by the Party claiming confidentiality, as provided in paragraph 13 below.

5. If a Party designates information as confidential pursuant to paragraphs 4 above or 6 below, it shall produce the confidential information in accordance with the procedures described in paragraphs 11 through 14 below, and concurrently provide certain information in writing to the commission and the Consumer Advocate. If a Party seeks to designate information as confidential, it must: (1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing Party from any misuse or unpermitted disclosure of the information. If the commission or any Party challenges the claim of confidentiality of the information, the Party claiming

confidentiality shall bear the burden of proof in supporting its claim of confidentiality, and the commission will determine whether the information is confidential and whether it should be disclosed under a protective order. Any challenge to the confidentiality of any information shall be made in accordance with paragraph 24 below.

6. Confidential information provided to the commission or a Party, orally or in any other form, shall be protected as fully as confidential information provided in written form. A Party shall notify the commission and the other Parties when information provided orally or in other than written form includes confidential information. At the time of such notification, the Party shall, in the manner provided in paragraph 5 above, specify the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm to the producing Party from any misuse or unpermitted disclosure of the information.

#### Form of Confidential Information

7. All information claimed to be confidential information shall be subject to the terms of this protective order, and shall be treated by all Qualified Persons (as defined by this protective order) as constituting confidential information. Unless a different treatment is warranted, any notes, summaries, abstracts, or analyses that are prepared by counsel, experts, or other Qualified Persons, and that reflect the underlying confidential information, shall also be subject to the terms of this protective order.

Designation

8. A Party claiming that information is confidential shall place upon the applicable confidential material the following legend:

**CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of a document, transcript, or other material is deemed to contain confidential information, the Party shall, to the extent reasonably practicable, limit the claim of confidentiality to only such portion. However, if such limitation is not reasonably practicable, the entire document, transcript, or other material may be designated as confidential information.

9. With respect to any confidential information that is not under the control of the Party claiming confidentiality, other persons shall, to the extent requested by that Party, cooperate to ensure that all copies of such confidential information bear the legend required in paragraph 8 above.

10. Any Party may request the commission to designate as confidential information any document or other information previously produced but not designated as confidential, provided that the Party, in the manner provided in paragraph 5 above, specifies the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm to the producing Party from any misuse or unpermitted disclosure of the information. In addition, the Party claiming confidentiality shall substitute the previously-produced but not

designated as confidential material with the identical material under designation as required in Paragraph 8 above.

Disclosure

11. Except as provided in paragraph 13, confidential information shall not be made available or disclosed to any person who is not a "Qualified Person" as defined in paragraph 12 below.

12. "Qualified Person," as used in this protective order means any one of the following:

- a. The author(s), addressee(s), or originator(s) of the confidential information;
- b. The commission, its staff, counsel (including employees directly employed by such counsel), and any consultants retained by the commission specifically to review the confidential information covered under this protective order;
- c. The Consumer Advocate, its staff, counsel (including employees directly employed by such counsel), and any consultants retained by the Consumer Advocate specifically to review the confidential information covered under this protective order;
- d. For TWTC, Ed Murley, Regulatory Vice President; Rochelle Jones, Senior Vice President, Regulatory; Tammy Chatfield, Regulatory Analyst; and TWTC's counsel; provided that none of these persons are engaged in developing, planning, marketing, or selling TWTC's products or services, or determining the costs of TWTC's products or services, or designing prices of TWTC's products or services to be charged to customers.
- d. Any person approved by the Party asserting the claim of confidentiality; and
- e. Any person designated as a Qualified Person by order of the commission.

13. When a Qualified Person wishes to disclose confidential information to a non-Qualified Person, the Qualified

Person must request permission from the Party claiming confidentiality. The request shall identify the non-Qualified Person to whom disclosure is desired; disclose any past, present, or anticipated affiliation between the Qualified Person and the non-Qualified Person; specify the exact information to be disclosed; and state the reasons for disclosure. If permission is granted by the Party claiming confidentiality, disclosure of the confidential information shall be made to such non-Qualified Person in the same manner as provided for Qualified Persons in paragraph 14 below.

#### Procedure for Obtaining Access

14. Prior to disclosing confidential information to a Qualified Person other than the commission and its staff, the Qualified Person shall read a copy of this protective order, complete a copy of the agreement attached as Exhibit "A" to this protective order, and sign the completed copy of the agreement. A copy of the executed agreement shall be delivered to the Party claiming confidentiality and the commission.

#### Use of Confidential Information

15. Any confidential information obtained under this protective order shall be used solely in connection with the review of the associated filing and any related administrative and judicial proceedings (at which time the information will continue to be treated as confidential), and shall not be used for any other purpose, including business, governmental or commercial purposes, or in any other administrative or judicial proceeding, except as provided in paragraphs 16 and 17,



and except as may be directed by (a) an order of court, (b) an order of the commission, and (c) the UIPA, including any ruling of the Office of Information Practices.

16. Subject to relevance, materiality and any other evidentiary requirements and subject to confidential protection as contained or set forth in this protective order, any confidential information obtained under this protective order may be used by the commission, its staff and its counsel (including employees directly employed by such counsel) in any proceeding pending before the commission involving the producing Party, or where the intended use of such confidential information is for the purpose of assisting the commission in fulfilling its statutory duties and responsibilities. The confidential information shall continue to be treated as confidential until the protection conferred by this protective order (or any other applicable protective order) is terminated by the producing Party, or until further order of the commission.

17. Subject to relevance, materiality and any other evidentiary requirements and subject to confidential protection as contained or set forth in this protective order, any confidential information obtained under this protective order may be used by the Consumer Advocate, its staff, its consultant and its counsel in any proceeding pending before the commission involving the producing Party, or where the intended use of such confidential information is for the purpose of assisting the Consumer Advocate in fulfilling its statutory duties and responsibilities. The confidential information shall continue to

be treated as confidential until the protection conferred by this protective order (or any other applicable protective order) is terminated by the producing Party, or until further order of the commission.

18. Unless otherwise ordered by the commission, if a Party desires to file written testimony, information requests, exhibits or any other material that contain or reflect the confidential information, only that part of the page(s) containing or reflecting such information shall be treated as confidential, and that part of any hearing at which such information is discussed shall be held in camera, or under other conditions imposed by the commission to prevent unnecessary public disclosure of such information. A copy of any confidential page, with any such information deleted, shall be filed to be included in the public record, and each such page shall contain the following designation in the upper left-hand corner:

**Confidential Information Deleted  
Pursuant To Protective Order No.\_\_\_\_\_.**

Retention of Confidential Information

19. Confidential information shall be retained in a locked cabinet dedicated to the storage of confidential information, or otherwise secured to ensure that access to and disclosure of the confidential information is limited to a Qualified Person.

20. Confidential information that is given to or filed with the commission or its staff shall be separately bound and

placed in a sealed envelope or other appropriate sealed container on which shall appear the following legend:

**THIS ENVELOPE IS SEALED PURSUANT TO PROTECTIVE ORDER NO. \_\_\_\_\_ AND CONTAINS DOCUMENTS WITH CONFIDENTIAL INFORMATION. IT IS NOT TO BE OPENED OR THE CONTENTS OF THIS ENVELOPE DISPLAYED OR REVEALED EXCEPT TO QUALIFIED PERSONS AUTHORIZED TO INSPECT THE ENCLOSED DOCUMENTS.**

21. Confidential information shall not be reproduced or duplicated, except to make working copies and copies to be filed with the commission under seal. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the following legend: "Copying Prohibited."

22. If a court or other administrative agency requests, subpoenas, or orders production of confidential information that a Qualified Person has obtained under this protective order, such person, prior to disclosure, shall promptly notify the Party claiming confidentiality of the request, subpoena, or order.

#### Duration of Confidentiality

23. The confidentiality of the information produced pursuant to this protective order shall be preserved until all interested Parties terminate the protection conferred by this protective order, or until further order of the commission.

#### Appeal to the Commission

24. If any interested person disagrees with the designation of information as confidential, the Party claiming confidentiality and the person so disagreeing shall first make a good faith attempt to resolve the dispute on an informal basis.

If the dispute cannot be resolved, the person contesting the confidentiality of the information shall file a motion to compel disclosure or any other appropriate motion with the commission. The Party claiming confidentiality shall bear the burden of proof in supporting its claim, and the commission will determine whether the information shall continue to be designated as confidential under this protective order. Pending a disposition of the motion, the information in question shall be treated as confidential information and shall not be disclosed except as permitted in this protective order.

#### Non-Waiver of Objections and Rights

25. The Parties retain the right to contest any assertion or finding of confidentiality or of non-confidentiality.

26. The Parties retain the right to question, challenge, and object to the admissibility of confidential information on the grounds of relevancy or materiality.

27. Nothing in this protective order shall prevent any Party from objecting to requests for production of information or other discovery requests.

#### Modification of the Protective Order

28. The commission may modify this protective order on the motion of any Party, or on its own motion, upon reasonable notice to the Parties and an opportunity for hearing, or the commission may modify this protective order upon receipt and approval of written stipulation by the Parties.

### Disposal of Confidential Information

29. Except as provided in paragraphs 30 and 31 below, within ninety days after the conclusion of this proceeding, persons in possession of confidential information shall, at the option of the Party producing the confidential information, return or destroy all such materials and all copies, notes, tapes, papers, or other medium containing, summarizing, excerpting, or otherwise embodying any confidential information. If the Party producing the confidential information requests destruction, the person destroying the information shall certify its destruction to the producing Party, indicating the name of the person destroying the documents, the method of destruction, and the identity of the specific documents destroyed.

30. Counsel and representatives of record for a Party shall be entitled to retain memoranda, pleadings, exhibits of record, written testimony, and transcripts embodying information derived from or incorporating confidential information to the extent reasonably necessary to preserve files on this proceeding. The files shall not be disclosed to any other person.

31. Confidential information produced in this proceeding shall remain in the possession of the commission, the Consumer Advocate and counsel for the Consumer Advocate for the duration required by applicable statutes, rules and administrative directives.

Sanctions

32. Any person violating this protective order shall be subject to sanctions imposed by the commission.

IV.

Order

THE COMMISSION issues this Protective Order to govern this proceeding.

DONE at Honolulu, Hawaii NOV - 8 2007.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

2007-0233.laa

By John E. Cole  
John E. Cole, Commissioner  
Leslie H. Kondo  
By Leslie H. Kondo  
Leslie H. Kondo, Commissioner

EXHIBIT "A"  
BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

PROTECTIVE AGREEMENT

1. I, \_\_\_\_\_, have been presented with a copy of Protective Order No. \_\_\_\_\_ issued by the Public Utilities Commission of the State of Hawaii in Docket No. 2007-0233 on the \_\_\_\_\_ day of \_\_\_\_\_, 2007 ("Protective Order").

2. I am employed, retained or assisting \_\_\_\_\_ in Docket No. 2007-0233 and have requested review of the confidential information covered by the Protective Order.

3. I understand the confidential information covered by the Protective Order is to be used solely to assist \_\_\_\_\_ and that unless otherwise permitted by the Protective Order, I am to make no other use of the confidential information, nor am I to disclose the confidential information to any other person.

4. I further understand that at the conclusion of my assistance to \_\_\_\_\_, I shall account for each copy, extract, note and summary of, or other document containing any part of such confidential information to the Party claiming confidentiality and I shall abide by the provisions in paragraph 29 of the Protective Order, unless otherwise permitted by paragraphs 30 and 31 of the Protective Order.

5. I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

DATED at: \_\_\_\_\_, \_\_\_\_\_, this \_\_\_\_\_, 2007.  
(city) (state) (date)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
\_\_\_\_\_

Address

(\_\_\_\_) \_\_\_\_\_  
Telephone Number



CERTIFICATE OF SERVICE

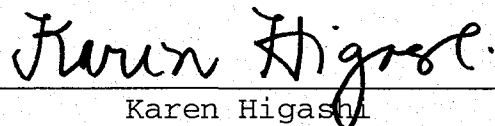
I hereby certify that I have this date served a copy of the foregoing Protective Order No. 23816 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

JOEL K. MATSUNAGA  
VICE PRESIDENT, EXTERNAL AFFAIRS  
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First Hawaiian Center, 23<sup>rd</sup> Floor  
999 Bishop Street  
Honolulu, HI 96813

  
\_\_\_\_\_  
Karen Higashi

DATED: NOV - 8 2007